

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS
CORPUS BY A PERSON IN STATE CUSTODY

IN THE UNITED STATES DISTRICT COURT OF LANCASTER NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
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Case No: 8:23cv488

FREDRICK E MCSWINE CONFINED AT RTC PO.BOX 22800 LINCOLN, NE 68542-28000 pro se
Inmate 66747

Fredrick E. Mcswine,
Petitioner,

v.

State Of Nebraska,
Respondent,

The Attorney General of the state of Nebraska

PETITION

Factual and Procedural Background

On July 12, 2013 Defendant was convicted by jury of terroristic threats, Kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. With the assistance of New counsel, Defendant filed a direct appeal, and the Nebraska Court of Appeals reversed defendant's convictions and remanded the case for a new trial on the grounds of Prosecutorial misconduct and trial counsel's to timely object to such comments. State v Mcswine, 22 Neb App. 791, 860 N.W.2d 776 (2015) March 10th Case No:A-13-887. The Nebraska Supreme court then reversed the Court of Appeals decision, and Defendants convictions were affirmed on remand. State v. Mcswine, 292 Neb. 565, 873 N.W. 2d 405 (2016). State v. Mcswine 24 Neb. App. 453, 890 N.W.2d 518 (2017) Jan 31st. Mcswine then filed a motion for postconviction for relief asserting numerous claims all of which, except for one claim were denied by the district court without an evidentiary hearing save for one, State v. Mcswine, No. 18-1082 2020 WL 4590276, Neb. App. (Aug, 11 2020) Mcswine Received an evidentiary hearing on April 28th 2022, On July 18th 2022 District Court Order Denying

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Postconviction Relief CR 12-1282. Then on May 30th 2023. case No A-22-611. The Nebraska Court of appeals Affirm the district court's order denying Mcswines request for Postconviction relief after the evidentiary hearing. Followed by a order entered by the Nebraska supreme court Ptetition Of Appellant for further review Denied On July 17th of 2023.

Petitioner beg this honerable court hear this timely filing under 28 U.S.C §2254 for relief by Writ of habeas corpus by a person in custody and confined to Nebraska state prison after haven pead Not Guilty in a case widely acknowledged to hinge upon consent and credibility. I Fredrick E. Mcswine am being held in violation of the following constitutional laws or treaties of the United States 5th due process of law. 6th have assistance of counsel for defense. 14th No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United State.

GROUND ONE

1. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

Prosecuter Eric Miller unambiuosly stated mileading statments about existing evidence not offerd by defense counsel. Evidence supporting Mcswines testimony ACI Police reports The false statements where made knowing their inaccuracy and untruthfulness to destroy Mcswines credability with the jury. The false comments where improper and prejudiced Mcswines right to a fair trial resulting in a conviction that violates due process. 5th and 14th Ammdment of U.S constitution.

GROUND TWO

2. INEFFECTIVE ASSISTANCE OF COUNSEL FAILED TO SUPPORT DEFENDANTS DEFENSE WITH EVIDENCE THAT CORROBORATED HIS TESTIMONEY; BY DEFAULT MADE IT POSSABLE FOR PROSECUTION TO MAKE MISLEADING FALSE COMMENTS.

The prosecutor forwarded defense counsel police reports ACI 39 and 53 conferment of Mcswines tesimoney about a trespass. In addition defense counsel stated in his affidavit that he and prosecutor had a discussion

about the trespass prior to trial. Credibility of the accused and alleged victim was key factor in this consent case. There was conflicting evidence presented as to whether the sexual encounter between Mcswine and C.S was Forced or Consensual. Incriminating text messages authored by Mcswine were a Key piece of evidence in evaluating Mcswine's version of events. Trial counsel's failure to offer evidence supporting his client testimony is deficient performance. Which opens the door for the prosecution to make false misleading comments that pervert the integrity of the trial. Such deficient performance prejudiced Mcswine's ability to receive a fair trial per U.S constitution 5th amend, Due process 6th assistance of counsel and 14th Due process laws guaranteed not to be abridged.

GROUND THREE

3. INEFFECTIVE ASSISTANCE OF COUNSEL, PRIOR TO TRIAL TRIAL COUNSEL FAILED TO SECURE AN EXPERT WITNESS TO ESTABLISH C.S AS AUTHOR OF THE NOTE EXHIBIT 48.

Had trial counsel secured an expert, defense would have been able to discredit the alleged victim with expert testimony corroborating defendant's version through expert testimony that C.S authored a Note, With specific directions how to get from her residence to the accused. Whom she claims to be a complete stranger of which she did not even know the name of. Regardless how well the accused and alleged victim were acquainted the existence of such Note is contradictory to the alleged victim's testimony. The nature of its existence warrants an explanation she authored a note to meet with total stranger then lie about it. In a consent case hinged upon credibility defense counsel was ineffective to secure such an expert who could have been used to impeach alleged victim and corroborate Mcswine's Credibility. This is deficient performance that prejudices Mcswine's right to confront his accuser's untruthfulness. Violating his 6th right to assistance of counsel and 14th due process and confrontation clause.

GROUND FOUR

4. TRIAL COUNSEL FAILED TO FILE WRITTEN MOTION 15 DAYS PRIOR TO TRIAL TO INTRODUCE EVIDENCE OF PRIOR SEXUAL RELATIONS WITH ALLEGED VICTIM RELEVANT TO THE ISSUE OF CONSENT.

Trial counsel not only failed to give 15 days notice but when opportunity to offer the evidence after the state prosecution opened the door defense counsel closed it by informing the court what defendant's response would have been when prosecution posed the question. "Now prior to October 13th 2012 you had never had sex with her before isn't that true?" McSwine informed trial counsel that this was a secret tryst between the alleged victim and the accused so he was aware. Trial counsel worked against his client and for the prosecution by not incorporating 27-412 information relevant to consent into his trial strategy and closing a door that had been opened by the state. Confrontation clause. a violation of McSwine's constitutional right to confront his accuser 14th & 6th right to assistance of counsel. When defense helped the state by interfering with the question it violated the accused's right to a fair trial and admit evidence he failed to secure 15 days prior.

GROUND FIVE)

5. TRIAL COUNSEL FAILED TO RECALL THE ALLEGED VICTIM AND IMPEACH HER PER 27-613, 27-607 and 27-608 ISSUES. THIS WOULD HAVE WITHOUT A DOUBT COMPROMISED THE ALLEGED VICTIM'S CREDIBILITY FOR TRUTHFULNESS IN THE EYES OF THE JURY.

A. Failed to impeach alleged victim for the "Note" of directions to the accused place of residence. The existence of the Note is a contradiction to her claims of McSwine being a total stranger and support McSwine's story of the note's existence being part of an ongoing secret relationship. Trial counsel failed to secure an explanation for why she authored it and why she lied about it.

B. Failed to confront alleged victim with deputy Ziemer's testimony that defendant's Penis did not present any injury consistent with her account given two times about having "bit" Mr. McSwine's Penis so hard she drew blood. This is a

direct contradiction of what the evidence support. Entirely unsupported by facts. alleged victim was never made to answer for her untruthfulness.

C. Counsel failed to call Blake Steavens a witness that saw both the accused and the alleged victim and gave a contradicting conflicting version of events where upon alleged victim was never confronted with the inconsistencies in her testimony. Mr. Stevens version of events support Mr. Mcswines version of events yet defense counsel never compelled alleged victim to answer for her untruthfulness with respect to eye witness testimony that support Mcswines version of events. Defense counsel failed to Impeach the alleged victim in a case based upon credibility for truthfulness. Issue 5A, 5B, 5C all support that alleged victim is a untruthful person and should have been impeached in the presence of the jury for them to weigh the facts and testimony for themselves. Trial counsel's failure to recall the alleged victim and confront her for her accumulative lies was a violation of Mr. Mcswines confrontation rights and a clear failure to perform on the level. His ineffectiveness so infected the trial there was no chance the jury could accurately assess credibility of the accused v. alleged victim. Making it fundamentally unfair to not defend and impeach a liar under oath. 6th and 14th Amendment violations accumulatively during 5A, 5B and 5C and 5D.

D. Counsel failed to call Nathan Buerch who claim she addressed accused by name.

GROUND SIX

6. STATE ERRORED IN NOT ALLOWING 27-412 IMPEACHMENT OF ALLEGED VICTIM AFTER STATE PROSECUTIONS QUESTIONING OPENED THE DOOR FOR CONFRONTATION Rule 412. The VICTIMS SEXUAL BEHAVIOR OR PREDISPOSITION (b) EXCEPTIONS. (C) EXCLUSION WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

After state prosecution opened the door to confrontation by illiciting a line of question that that present the alleged victim to seem more sexually naive. During questioning alleged victim claim accused had to instruct her how to perform felatio claiming she did not know what to do when accused allegedly forced her

To do so, this untruthful statement was later confirmed on cross examination when defense counsel directly ask if untruthful statment was true. Alledged victim again lied under oath a fact later confirmed after a closed camuara hearing which reveal a calamity of character evidence and istances of untruthfulness. State errored in denying the accued constitutional right to conforunt his accuser in a case based upon credability. This was a 14th Amendment right to due process and a 6th Amendment right to assistance of counsel by failing to incorporate 412 evidence into his trial stratagy.

GROUND SEVEN

7. STATE ERROED IN NOT GRANTING RELIFE ON ACTUAL INNOCENT CLAIM OR BARE INNOCENT CLAIM IN A CONSENT CASE BASED UPON CREDABILITY OF A INMEACHABLE WITNESS.

It is in fact the purpose of a trial is to ascertain the truth based upon all the fact relevant to the issue at hand. Consent and credability in this case are paramount and the imporance of them being the leading contributing facter in determining the out come of the trial has been universally agreed upon by both the State and Applet Court's. There is no eveidence of a forcable sexual assult SANE nure testeified that the "Just becuse ther is no sign of sexual assult does not mean one did not occur." All throughout trial the alleged victim was untruthful and was allowed to go unchecked in a case where it can be proven her credibility was in question. Yet, the jury never once saw the alleged victim impeached for her lies under oath. The accued has maintained this was a consensual secret ongoing trist where the alleged victim claim a false rape to avoid being caought cheating. Dismissing any further suspicions of infidelity on her part by nameing Mcswine a stranger, and concealing the natuer of how well she know the accused. Never was she made to explain the accumulative lies, though with in her decit the answer as to Mcswines claim of false rape and innocence can be found. Trial counsels failer to impeach the alleged victim in the eyes of the jury was

Catastrophic to the fairness of the trial process. Also the court errored in not allowing 412 impeachment. Save for the alledged vicimes testimony there is not evedence to support a claim of sexuak assilt. The court errored in not allowing the impeachment of the alleged victim whoms testimony the whole case rest upon. Trial counsel failed to included 412 evidence into trial stratigy. This was a violation of Due Process and Ineffectiveness of counsel a 14th and 6th Amendment of the U.S constitution.

Direct appeal and Post-conviction

All the ground raised here in this Habeas Pettion have been argued and properly secuerd for the record on direct appeal BY Mark Rapple. Post-conviction was handeled by Jason E.Troia, All appeals have been filed timly and according to requioerments by law. At trail I was represented by Jeffery A. Pickens attorney for Nebraska state commission of public advocacy 140 N. 8th Street, Suite 270 P.O box 98932 Lincoln Ne 68509.

At direct appeal I was represented by Mark Rappl 1111 Lincoln Mall suite 300 Lincoln Ne. 68505

On Post- conviction my case was handeled by Jason E. Troia 1403 Farnam street suite 232 omaha Ne 68102.

I have served 11 years on a 55-~~85~~ year sentance and am wrongfully convicted it is this conviction of which I am challenging. With in the timeline limitation Nebraska supreme court Denied Further review on july 17th 2023. I have exhausted all my means of redress. This case has from the very start been one of credibility the jry never got the chance to hear the impeachment that i have raised here in this petiton I am factuly innocent and the chance to wieghe that evedences rest.

with the jury. Though the fact remain the evidence would have been the same for the jury resting upon whom version they found to be believeable the accused Mcswine or the accuser CB whom was never impeached nor confronted for perjury Defendant is actually innocent of all the charges that he stands convited for and is serving sentences for based upon untruthful testimony alone.

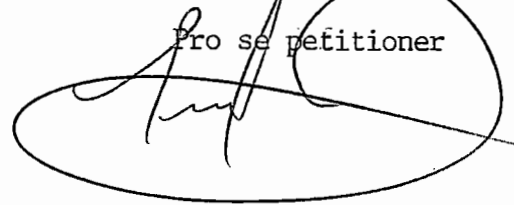
Conclusion

For the aforementioned reasons Fredrick Mcswine aka Fredrick Johnson 66747 respectfully prays this honerable court grant the petition for writ of Habeas 28 U.S.C § 2254

Respectfully submitted this 3rd day of October, 2023.

Fredrick E Mcswine aka Johnson 66747

Pro se petitioner



Signed and sworn on this day before a notery of public

Kelly J Ward
Notary

Seal



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60747 / Meswme

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